Mamaroneck, and the said defendant, The First National Bank in Mamaroneck, received and accepted said check, and surrendered the above mentioned note to the defendant, R. G. Brewer, Inc.

Sixteenth: Upon information and belief, that the defendant, R. G. Brewer, Inc., delivered the above mentioned check to the defendant, The First National Bank in Mamaroneck, on the 14th day of January, 1933, and the defendant, The First National Bank in Mamaroneck, surrendered the above mentioned note to the defendant, R. G. Brewer, Inc., on the same date, before the maturity of the said note.

Seventeenth: Upon information and belief, that the defendants, R. G. Brewer, Inc., and The First National Bank in Mamaroneck, knew that the said defendant, The First [fol. 6] National Bank in Mamaroneck, would not resume business on the next business day, and that in fact, the said defendant, The First National Bank in Mamaroneck, did not resume business on the next regular business day, that is on January 16th, 1933.

Eighteenth: That as a result of the said conspiracy, and the failure of the defendant, The First National Bank in Mamaroneck, to resume business on the 16th day of January, 1933, the plaintiff did not receive the principal of the check, drawn by the defendant, R. G. Brewer, Inc., upon the funds it had on deposit with the defendant, The First National Bank in Mamaroneck.

Nineteenth: That by reason of the premises, the plaintiff has suffered damages in the sum of Three Thousand Fifteen ($3,015.00) Dollars.

Twentieth: That the plaintiff does not have an adequate remedy at law.

For a Third Cause of Action

Twenty-first: That the plaintiff repeats, reiterates and realleges each and every allegation of its complaint herein contained, marked paragraphs, "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth" and "Ninth", inclusive, with the same force and effect as if the same were herein set forth at length.

Twenty-second: Upon information and belief, that the defendants, Henry E. Meeker and The First National Bank

[fol. 7] in Mamaroneck, now have in their possession the said check drawn by the defendant, R. G. Brewer, Inc., on the 14th day of June, 1933, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, to the order of the defendant, The First National Bank in Mamaroneck.

Twenty-third: That the plaintiff has demanded that the defendants, Henry E. Meeker and The First National Bank in Mamaroneck, assign and deliver the said check to the plaintiff, and the plaintiff demands now that the said defendants, Henry E. Meeker and The First National Bank in Mamaroneck, deliver and assign the said check to it, but the said defendants, Henry E. Meeker and The First National Bank in Mamaroneck, have refused and still refuse to make said assignment and delivery.

Twenty-fourth: That the plaintiff does not have an adequate remedy at law.

Wherefore, the plaintiff prays for equitable relief as follows:

1. That a writ of subpoena may be granted to the plaintiff to be directed to the defendants to wit, Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, The First National Bank in Mamaroneck and R. G. Brewer, Inc., thereby requiring the said defendants personally to appear on a certain day, before the Court, and then and there, full, true, direct and perfect answers make, to all and singular the premises, and further to per-
[fol. 8] form and abide by such further order, direction or decree therefor as to the Court may seem meet.

2. That the plaintiff be adjudged and decreed to be entitled to establish, and do have established, the full amount of this claim, to wit, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, with interest thereon at six (6%) per cent. per annum, from said 16th day of January, 1933, and the said defendant, Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, be directed to pay the full amount thereof out of any funds in his hands prior to any payments or further payments to the general creditors of said bank,

Or in the Alternative

3. That the plaintiff be adjudged and decreed to be the owner of the check drawn by the defendant, R. G. Brewer, Inc., on the 14th day of January, 1933, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, to the order of the defendant, The First National Bank in Mamaroneck, and that the defendants, Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, and the First National Bank in Mamaroneck, be directed to assign and deliver the said check to the plaintiff.

4. That the defendant, R. G. Brewer, Inc., be ordered and decreed to pay the plaintiff the sum of Three Thousand Fifteen ($3,015.00) Dollars in full payment for the principal of the said check, together with interest at the rate of six (6%) per cent. per annum, from the 16th day of January, 1933.

[fol. 9] 5. That the plaintiff have such other and further relief as the Court may deem proper and equitable.

Israel H. Mandel, Attorney for Plaintiff, Office and P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

In United States District Court, Southern District of New York

[Title omitted]

Notice of Motion to Dismiss Bill of Complaint

Sir: Please take notice that upon the complaint herein, the defendant, Hiram E. Meeker, as receiver of the First National Bank in Mamaroneck, sued herein as Henry E. Meeker, as receiver for the First National Bank in Mamaro-
[fol. 10] neck, will move this court at a term thereof to be held at the United States Court and Postoffice Building, in the Borough of Manhattan, City of New York, on the 11th day of July, 1933, at 10:30 o'clock in the forenoon of that day, for an order dismissing the complaint herein as to said defendant, upon the ground that said complaint and each and every cause of action therein set forth fails upon

the face thereof to set forth facts sufficient to constitute a cause of action in equity.

Dated White Plains, New York, June 30, 1933.

Yours, etc., Lynch, Cahn & Weed, Attorneys for Defendant, Meeker, Office & P. O. Address: Bar Building, White Plains, New York.

To Israel H. Mandel, Esq., Attorney for Plaintiff, 191 Joralemon Street, Brooklyn, New York.

[fol. 11] In United States Dissrict Court, Southern District of New York

E. 76-139

Old Company's Lehigh, Inc., Plaintiff,

against

Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck; The First National Bank in Mamaroneck and R. G. Brewer, Inc., Defendants.

Opinion, Coxe, D. J.

The complaint in this action alleges that the Brewer Check for $3,015. was drawn against funds in the Mamaroneck Bank and that the check was accepted; and, further, that the $3,000. note was thereupon delivered to the Brewer Company. There was, therefore, no trust under Federal law which entitled the plaintiff to preferential treatment in the liquidation of the Bank. The provisions of the New York Negotiable Instruments Law are not applicable as the National Banking Act alone regulates the distribution of assets of insolvent national banks; and the Federal Statutory law in that respect is supreme. I think, therefore, that the first cause of action is plainly insufficient. The second cause of action is predicated on fraud; and fraud does not entitle the plaintiff to priority in payment from the Bank's assets and delivery to the plaintiff of the Brewer checks, as prayed for in the third cause of action, and will avail the plaintiff nothing, as the check was honored and

[fol. 12] paid by the bank, and delivery to the plaintiff at this time will add nothing to the plaintiff's claim.

The motion to dismiss as to the defendant Meeker is granted.

August 3, 1933.

Coxe, U. S. D. J.

In United States District Court

[Title omitted]

Order on Motion to Dismiss—August 22, 1933

A motion having been made herein by defendant Meeker, as receiver, for an order dismissing the complaint herein [fol. 13] as to him for failure to state a cause of action in equity, and said motion having duly come on to be heard on the 1st day of August, 1933.

Now, upon reading and filing the said notice of motion dated June 30, 1933, and upon the complaint herein, and after hearing Monroe J. Cahn, Esq., of counsel for the defendant, Meeker, in support of said motion, and Israel H. Mandel, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the court herein, upon motion of Lynch, Cahn & Weed, attorneys for the defendant, Meeker, it is

Ordered, that the said motion be and the same hereby is granted; and it is

Further ordered, that the complaint herein be and the same hereby is dismissed as against the defendant, Meeker, as receiver of The First National Bank of Mamaroneck; and it is

Further ordered, that the plaintiff herein may serve an amended complaint within ten days from the date of the entry of this order and the service of a copy thereof.

Alfred C. Coxe, United States District Judge.

[fol. 14] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED BILL OF COMPLAINT

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The above named plaintiff, for its amended bill of complaint herein, alleges:

For a First Cause of Action

First: That the plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business in the City of Philadelphia, State of Pennsylvania, where it is duly licensed to do business.

Second: That upon information and belief, the defendant, R. G. Brewer, Inc., is a corporation duly organized and ex-
[fol. 15] isting under and by virtue of the laws of the State of New York, with its principal place of business in the City of Mamaroneck, in the State of New York, in the Southern District of New York.

Third: That the defendant, The First National Bank in Mamaroneck is a National Bank organized and operating under the National Banking Laws, which said bank suspended business on the 16th day of January, 1933, on account of insolvency, and in due course, a Receiver was appointed by the Comptroller of the Currency, qualified, and took charge of the assets of the said bank, said Receiver being the defendant, Henry E. Meeker, who now is in charge of the assets of said bank.

Fourth: That the grounds upon which this Court's jurisdiction depends, are that this is a suit arising under the laws of the United States, in which the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars, and this suit is also a case for winding up the affairs of a National Banking Institution, and upon the further ground that the plaintiff is a citizen of the State of New Jersey, and the defendant,

R. G. Brewer, Inc., is a citizen of the State of New York, and the controversy between the said plaintiff and the above mentioned defendant, R. G. Brewer, Inc., exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

Fifth: That on the 12th day of January, 1933, the plaintiff deposited for collection with the Central Penn National Bank of Philadelphia, a note, made by the defendant, R. G. [fol. 16] Brewer, Inc., to the order of the plaintiff, in the sum of Three Thousand ($3,000.00) Dollars, which note became due and payable on the 16th day of January, 1933, at the office of the defendant, The First National Bank in Mamaroneck.

Sixth: That upon information and belief, the said Central Penn National Bank of Philadelphia forwarded the above mentioned note for collection through the Chase National Bank of New York and the Federal Reserve Bank of New York, to the defendant, The First National Bank in Mamaroneck.

Seventh: That the plaintiff in depositing said note for collection, as alleged in paragraph, "Fifth" hereof, and the defendant, The First National Bank in Mamaroneck, in accepting said note for collection, as alleged in paragraph, "Sixth" hereof, entered into these contractual obligations with full knowledge, and with the intent that Article 19-A of the Negotiable Instruments Law of the State of New York should govern the relationship and the obligations of the parties, and plaintiff respectfully requests the Court to take judicial notice of the provisions of Article 19-A of the Negotiable Instruments Law of the State of New York, with the same force and effect as if the same were set forth at length herein.

Eighth: Upon information and belief, that on the 14th day of January, 1933, the defendant, R. G. Brewer, Inc., tendered its check in the sum of Three Thousand Fifteen ($3,015.00) Dollars to the defendant, The First National Bank in Mamaroneck, and that the said defendant, The [fol. 17] First National Bank in Mamaroneck, accepted said check and delivered to the defendant, R. G. Brewer, Inc., the above mentioned note made by the defendant, R. G. Brewer, Inc., to the order of the plaintiff.

Ninth: That the said check, tendered by the defendant, R. G. Brewer, Inc., was drawn upon the funds the said R. G. Brewer, Inc., had on deposit with the defendant, The First National Bank in Mamaroneck.

Tenth: That on the 16th day of January, 1933, the defendant, The First National Bank in Mamaroneck, did not resume business because of insolvency, and in due course, the defendant, Henry E. Meeker, was appointed Receiver for said bank by the Comptroller of the Currency.

Eleventh: That subsequently thereto, and namely, on the 9th day of June, 1933, the plaintiff filed with the defendant, Henry E. Meeker, a claim in the sum of Three Thousand Fifteen ($3,015.00) Dollars, alleging that such claim is a preferred one and that a trust existed in favor of the plaintiff as against the defendant, The First National Bank in Mamaroneck, and the said defendant, Henry E. Meeker, rejected the said claim.

Twelfth: That the plaintiff does not have an adequate remedy at law.

For a Second Cause of Action

Thirteenth: That the plaintiff repeats, reiterates and realleges each and every allegation of its amended complaint [fol. 18] herein contained, marked paragraphs, "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth," "Eleventh," and "Twelfth," with the same force and effect as if the same were herein set forth at length.

Fourteenth: Upon information and belief, that on the 14th day of January, 1933, the defendant, The First National Bank in Mamaroneck, was wholly insolvent, and the said defendant and the defendant, R. G. Brewer, Inc., well knew of the said insolvency.

Fifteenth: Upon information and belief, that R. G. Brewer, the treasurer of the defendant, R. G. Brewer, Inc., who handled the transaction on behalf of the said defendant, R. G. Brewer, Inc., as alleged in this complaint, was also a director and managing officer of the defendant, The First National Bank in Mamaroneck, and was familiar with all the details as to its insolvency and imminent receivership.

Sixteenth: That the defendant, The First National Bank in Mamaroneck, acted without the scope of its authority as agent for the collection of the note of the plaintiff which became due and payable on the 16th day of January, 1933, in releasing said note to the defendant, R. G. Brewer, Inc., on the 14th day of January, 1933, two days prior to the date of the maturity of said note, and in accepting payment in another medium than cash.

Seventeenth: Upon information and belief, that the defendant, The First National Bank in Mamaroneck, and the defendant, R. G. Brewer, Inc., conspired together and [fol. 19] formed the deliberate design and purpose of defrauding the plaintiff and of discharging the liability of the defendant, R. G. Brewer, Inc., on the note, to the order of the plaintiff, in the sum of Three Thousand ($3,000.00) Dollars, which note became due on the 16th day of January, 1933.

Eighteenth: Upon information and belief, that in furtherance of this conspiracy and plan, the defendant, R. G. Brewer, Inc., executed and delivered a check, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, payable out of the funds the said defendant, R. G. Brewer, Inc., had on deposit with the defendant, The First National Bank in Mamaroneck, and the said defendant, The First National Bank in Mamaroneck, received and accepted said check, and surrendered the above mentioned note to the defendant, R. G. Brwer, Inc.

Nineteenth: Upon information and belief, that the defendant, R. G. Brewer, Inc., and The First National Bank in Mamaroneck, knew that the said defendant, The First National Bank in Mamaroneck, would not resume business on the next business day, and that in fact, the said defendant, The First National Bank in Mamaroneck, did not resume business on the next regular business day, that is, on January 16th, 1933.

Twentieth: Upon information and belief, that on January 14th, 1933, at the time the defendant, The First National Bank in Mamaroneck, accepted the check of the defendant, [fol. 20] R. G. Brewer, Inc., and surrendered the note, as aforestated, the said defendant, R. G. Brewer, Inc., had on deposit with the said bank ample funds to cover the amount

due on the note, namely, the sum of Three Thousand Fifteen ($3,015.00) Dollars.

Twenty-first: That by the acceptance of the said check drawn by the defendant, R. G. Brewer, Inc., and made payable to the order of the defendant, The First National Bank in Mamaroneck, the sum of Three Thousand Fifteen ($3,015.00) Dollars was immediately charged against the account of the defendant, R. G. Brewer, Inc., and became a special trust fund in the possession of the defendant, The First National Bank in Mamaroneck, to be remitted in payment of the aforementioned note of the plaintiff.

Twenty-second: That as a result of the said conspiracy, and the failure of the defendant, The First National Bank in Mamaroneck, to resume business on the 16th day of January, 1933, the plaintiff did not receive the principal of the check, drawn by the defendant, R. G. Brewer, Inc., upon the funds it had on deposit with the defendant, The First National Bank in Mamaroneck.

Twenty-third: That by reason of the premises, the plaintiff has suffered damages in the sum of Three Thousand Fifteen ($3,015.00) Dollars.

Twenty-fourth: That the plaintiff does not have an adequate remedy at law.

[fol. 21] For a Third Cause of Action

Twenty-fifth: That the plaintiff repeats, reiterates and realleges each and every allegation of its amended complaint herein contained, marked paragraphs, "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", 'Eighth", "Ninth,", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth", "Sixteenth", "Seventeenth", "Eighteenth", "Nineteenth", "Twentieth", "Twenty-first", "Twenty-second,", "Twenty-third", and "Twenty-fourth," with the same force and effect as if the same were herein set forth at length.

Twenty-sixth: Upon information and belief, that the defendants, Henry E. Meeker and The First National Bank in Mamaroneck, now have in their possession the said check drawn by the defendant, R. G. Brewer, Inc., on the 14th

day of June, 1933, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, to the order of the defendant, The First National Bank in Mamaroneck.

Twenty-seventh: Upon information and belief, that the defendant, The First National Bank in Mamaroneck, accepted from the defendant, R. G. Brewer, Inc., the aforestated check in the sum of Three Thousand Fifteen ($3,015.00) Dollars, on the 14th day of January, 1933, after banking hours.

Twenty-eighth: Upon information and belief, that the defendant, The First National Bank in Mamaroneck, did not [fol. 22] charge the said check of Three Thousand Fifteen ($3,015) Dollars against the account of the defendant, R. G. Brewer, Inc., and that the said check of Three Thousand Fifteen ($3,015.00) Dollars is still in the possession of the defendant, Henry E. Meeker, the Receiver of said bank, unpaid and not charged against the account of the drawer of said check.

Twenty-ninth: That the defendant, The First National Bank in Mamaroneck, exceeded its authority as agent for collection of the note hereinbefore mentioned, in surrendering said note without receiving in cash the amount due on said note, and further in surrendering said note two days before the date of its maturity, and that the said check of Three Thousand Fifteen ($3,015.00) Dollars constitutes a negotiable instrument, the proceeds of the wrongdoing of the agent bank, the defendant, The First National Bank in Mamaroneck, which negotiable instruments has not yet been discharged and cancelled by payment, and the possession and ownership thereof rightfully belongs to the plaintiff.

Thirtieth: That the plaintiff has demanded that the defendants, Henry E. Meeker and The First National Bank in Mamaroneck, assign and deliver the said check to the plaintiff, and the plaintiff demands now that the said defendants, Henry E. Meeker, and The First National Bank in Mamaroneck, deliver and assign the said check to it, but the said defendants, Henry E. Meeker and The First National Bank in Mamaroneck, have refused and still refuse to make said assignment and delivery.

[fol. 23] Thirty-first: That the plaintiff does not have an adequate remedy at law.

Wherefore, the plaintiff prays for equitable relief as follows:

1. That a writ of subpoena may be granted to the plaintiff to be directed to the defendants to wit, Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, The First National Bank in Mamaroneck and R. G. Brewer, Inc., thereby requiring the said defendants personally to appear on a certain day, before the Court, and then and there, full, true, direct and perfect answers make, to all and singular the premises, and further to perform and abide by such further order, direction or decree therefore as to the Court may seem meet.

2. That the plaintiff be adjudged and decreed to be entitled to establish, and do have established, the full amount of this claim to wit, in the sum of Three Thousand Fifteen ($3,015.00) Dollars, with interest thereon at six (6%) per cent. per annum, from said 16th day of January, 1933, and the said defendant, Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, be directed to pay the full amount thereof out of any funds in his hands prior to any payments or further payments to the general creditors of said bank.

Or in the Alternative

3. That the plaintiff be adjudged and decreed to be the owned of the check drawn by the defendant, R. G. Brewer, Inc., on the 14th day of January, 1933, in the sum of Three [fols. 24 & 25] Thousand Fifteen ($3,015.00) Dollars to the order of the defendant, The First National Bank in Mamaroneck and that the defendants Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, and The First National Bank in Mamaroneck, be directed to assign and deliver the said check to the plaintiff.

4. That the defendant, R. G. Brewer, Inc., be ordered and decreed to pay the plaintiff the sum of Three Thousand Fifteen ($3,015.00) Dollars in full payment of the principal of the said check, together with interest at the rate of six (6%) per cent. per annum, from the 16th day of January, 1933.

5. That the plaintiff have such other and further relief as the Court may deem proper and equitable.

Israel H. Mandel, Attorney for Plaintiff, Office and P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

Duly sworn to by H. H. Pease. Jurat omitted in printing.

[fol. 26] In United States District Court, Southern District of New York

[Title omitted]

Notice of Motion to Dismiss Amended Bill of Complaint

Sir: Please take notice that upon the amended complaint herein, the defendant, Hiram E. Meeker, as receiver of First National Bank in Mamaroneck, sued herein as Henry E. Meeker, as receiver for the First National Bank in Mamaroneck, will move this court at a term thereof to be held at the United States Court and Postoffice Building, in the Borough of Manhattan, City of New York, on the 26th day of September, 1933, at 10:30 o'clock in the forenoon of that day, for an order dismissing the complaint herein as to said defendant, upon the ground that said amended complaint and each and every cause of action therein set forth fails upon the face thereof to set forth facts sufficient to [fol. 27] constitute a cause of action in equity.

Dated, White Plains, New York, September 18th, 1933.

Yours, etc., Lynch, Calm & Weed, Attorneys for Defendant, Meeker, Office & P. O. Address: Bar Building, White Plains, N. Y.

To: Israel H. Mandel, Esq., Attorney for Plaintiff, 191 Joralemon Street, Brooklyn, N. Y.

[fol. 28] In United States District Court, Southern District of New York

E. 76-139

Old Company's Lehigh, Inc., Plaintiff,

against

Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck; The First National Bank in Mamaroneck and R. G. Brewer, Inc., Defendants

Opinion, Coleman, D. J.

Motion to dismiss the complaint must be granted because of Judge Coxe's decision on the previous motion. The new allegations do not change the situation from what Judge Coxe passed on. They are merely allegations of conclusions of law or of immaterial details under Judge Coxe's rulings.

September 26, 1933.

F. J. C., U. S. D. J.

[fol. 29] In United States District Court

[Title omitted]

Order of Dismissal—October 6, 1933

A motion having been made herein by the defendant Meeker, as receiver for an order dismissing the amended complaint herein as to him for failure to state a cause of action in equity, and said motion having duly come on to be heard on the 26th day of September, 1933,

Now, upon reading and filing the said notice of motion dated September 18, 1933, and upon the amended complaint herein, and after hearing Alfred S. Schechter, Esq., of counsel for the defendant Meeker, in support of said motion, and Israel H. Mandel, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the court herein, upon motion of Lynch, Cahn & Weed, attorneys for the de-

[fol. 30] fendant Meeker, it is

Ordered, that the said motion be, and the same hereby is, granted in all respects; and it is further

Ordered, that the amended complaint herein be and the same hereby is dismissed as against the defendant Meeker, as receiver of the First National Bank in Mamaroneck.

Frank J. Coleman, United States District Judge.

In United States District Court, Southern District of New York

E. 76-139

Old Company's Lehigh, Inc., Plaintiff,

against

Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck; The First National Bank in Mamaroneck and R. G. Brewer, Inc., Defendants

Judgment

A motion made herein by the defendant, Meeker, as Receiver for the First National Bank in Mamaroneck, for an order dismissing the amended complaint herein as to him for failure to state a cause of action in equity, having been duly granted by an order made and entered herein on the 9th day of October, 1933.

[fol. 31] Now, on motion of Lynch, Cahn & Weed, attorneys for the defendant, Meeker,

It is adjudged, that the plaintiff's amended complaint be, and the same hereby is, dismissed as to the defendant, Henry E. Meeker, as Receiver for the First National Bank of Mamaroneck, and that the defendant, Henry E. Meeker, as Receiver for the First National Bank of Mamaroneck, recover of the plaintiff, Old Company's Lehigh, Inc., the sum of $27.00 costs as taxed, and have execution therefor.

Dated New York, N. Y., October 24th, 1933.

Charles Weiser, Clerk.

In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal

Sirs: Please take notice, that the plaintiff, Old Company's Lehigh, Inc., hereby appeals to the United States [fol. 32] Circuit Court of Appeals, for the Second Circuit, from the judgment in favor of the defendant, Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, and against the plaintiff, Old Company's Lehigh, Inc., dismissing the plaintiff's amended complaint, entered in the Office of the Clerk of this Court, on the 24th day of October, 1933, and the order entered herein the 9th day of October, 1933, directing said judgment, and from each and every part of said judgment and order, as well as from the whole thereof.

Dated Brooklyn, New York, December 1st, 1933.

Yours, etc., Israel H. Mandel, Attorney for Plaintiff, Office & P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

To Lynch, Cahn & Weed, Esqs., Attorneys for Defendant, Henry Meeker, Office & P. O. Address: Bar Building, White Plains, New York. Clerk of the United States District Court, Southern District of New York. Meighan & Necarsulmer, Esqs., Attorneys for Defendant, R. G. Brewer, Inc., 120 Broadway, New York, New York.

[fol. 33] In United States District Court, Southern District of New York

[Title omitted]

Petition for Appeal

Old Company's Lehigh, Inc., the above named plaintiff, considering itself aggrieved by the decree of this Court, made and entered in the above entitled cause on the 9th day of October, 1933, hereby appeals from each and every

part thereof to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the Assignment of Errors filed herein, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers, duly authenticated, may be transmitted to the United States Circuit Court of Appeals, for the Second Circuit.

Israel H. Mandel, Attorney for Plaintiff, Office & P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

[fol. 34] In United States District Court

[Title omitted]

Order Allowing Appeal—Dec. 2, 1933

Upon reading and filing the petition of the plaintiff for an allowance of an appeal herein, and the Notice of Appeal and the Assignment of Errors, and on motion of Israel H. Mandel, attorney for plaintiff, it is hereby

Ordered, that the said appeal be and the same hereby is allowed; and it is further

Ordered, that a citation addressed to the defendant herein be issued according to law; and it is further

[fol. 35] Ordered, that a transcript of the record, papers and proceedings herein, duly authenticated by the Clerk of this Court, be transmitted to the United States Circuit Court of Appeals, for the Second Circuit, and that such other and further proceedings be had herein as may be just and proper in the premises.

Francis G. Caffey, U. S. D. J.

In United States District Court, Southern District of New York

[Title omitted]

Assignment of Errors

And now comes Old Company's Lehigh, Inc., the plaintiff, and says that in the record and proceedings in the above entitled cause, there is error in this, to wit:

1. That the Court below erred in granting the order made and entered herein on th 22nd day of August, 1933, dis- [fol. 36] missing the complaint herein as against Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, on the ground that the said complaint failed to state a cause of action in equity, and dismissing the said complaint.

2. That the Court below erred in holding that there was no trust which entitled the plaintiff to preferential treatment in the liquidation of the bank.

3. That the Court below erred in holding that the provisions of the New York Negotiable Instruments Law were not applicable to the facts in this case, or that they are in conflict with the Federal Statutory Law.

4. That the Court below erred in holding that plaintiff was not entitled to delivery and assignment to it by the Receiver of the check of Three Thousand Fifteen ($3,- 015.00) Dollars issued by the defendant, R. G. Brewer, Inc.

5. That the Court below erred in granting the order made and entered herein on the 9th day of October, 1933, dismissing the amended complaint herein as against Henry E. Meeker, as Receiver for the First National Bank in Mamaroneck, on the ground that the said amended complaint failed to state a cause of action in equity, and dismissing the said amended complaint.

Wherefore, and for divers other reasons, as will appear in the record, plaintiff prays that the decree and the judg- [fols. 37 & 38] ment enrolled therein be reversed with directions to award judgment for plaintiff with costs.

Old Company's Lehigh, Inc., by Israel H. Mandel, Attorney for Plaintiff, Office & P. O. Address: 191 Joralemon Street, Borough of Brooklyn, City and State of New York.

Citation in usual form omitted in printing.

[fol. 39] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated February —, 1934.

Israel H. Mandel, Attorney for Plaintiff. Lynch, Cahn & Weed, Attorneys for Defendant Meeker. Meighan & Necarsulmer, Attorneys for Defendant Brewer.

[fol. 40] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 438

Argued May 10, 1934. Decided June 4, 1934

OLD COMPANY'S LEHIGH, INC., Plaintiff-Appellant,

v.

HENRY E. MEEKER, as Receiver for THE FIRST NATIONAL BANK IN MAMARONECK, The First National Bank in Mamoroneck and R. G. Brewer, Inc., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Chase, Circuit Judges

The plaintiff appeals from a decree dismissing on motion its amended bill of complaint as against the defendant Meeker as receiver for the First National Bank of Mamaroneck, on the ground that it fails to state a cause of action in equity. Decree reversed.

Israel H. Mandel, of Brooklyn, N. Y., for appellant.

Lynch, Cahn & Weed, of White Plains, N. Y. (Monroe J. Cahn, of White Plains, N. Y., and Alfred S. Schechter, of White Plains, N. Y., of counsel), for appellees.

SWAN, Circuit Judge:

The bill having been dismissed upon motion, equivalent to a demurrer, the facts must be accepted as alleged. The plaintiff, a New Jersey corporation, was the owner of a promissory note for $3,000 made by R. G. Brewer, Inc., a New York corporation, to the order of the plaintiff, and payable on January 16, 1933, at the office of the First National Bank of Mamaroneck, a corporation organized under the national banking laws. On January 12, 1933, the plaintiff deposited this note for collection with a bank in Philadelphia, which forwarded it through the Chase National Bank and the Federal Reserve Bank of New York

to the said Mamaroneck bank for collection. The latter, on January 14, 1933, accepted the check of R. G. Brewer, Inc., for $3,015, drawn upon its general deposit with said Mamaroneck bank, and delivered the note to its maker. January 14th was a Saturday, and on the following Monday, the 16th, the Mamaroneck bank did not resume business because of insolvency. In due course the defendant Meeker was appointed its receiver by the Comptroller of the Currency. Subsequently, the plaintiff filed with him a preferred claim for the sum of $3,015, which he rejected. The foregoing facts are alleged in the first count of the plaintiff's amended bill of complaint.

The second count repeats the allegations of the first and adds the following: The Mamaroneck bank was insolvent on January 14th, and Mr. Brewer, who acted for the maker of the note and was also a director and managing officer of the bank, was well aware of its insolvency and imminent receivership. In delivering the note to the maker before its maturity and in accepting the maker's check in payment, the bank exceeded its authority as agent for collection. It is charged that in so acting it was carrying out a conspiracy with R. G. Brewer, Inc., to discharge the latter's liability on its note and to defraud the plaintiff. When the bank accepted the check, R. G. Brewer, Inc., had on deposit with the bank ample funds to cover the amount thereof, and by acceptance of the check the sum of $3,015 was immediately charged against the account of R. G. [fol. 42] Brewer, Inc., and became a special trust fund in the possession of the bank to be remitted to the plaintiff, but it was not remitted.

The third count reiterates the allegations of the first and second and alleges further that the said check was accepted on January 14th after banking hours and was not charged by the bank against the deposit account of R. G. Brewer, Inc., that the receiver has possession of the check which has not yet been discharged or canceled, and that the plaintiff has demanded that the bank and its receiver assign and deliver the check to the plaintiff, but they have refused to do so.

The bill prays that the receiver be directed to pay the plaintiff's claim for $3,015 in priority to claims of general creditors, or, in the alternative, that the bank and the receiver be ordered to assign and deliver the said check to the plaintiff.

When the Mamaroneck bank received the note for collection, it held it as the plaintiff's agent. This is provided by section 350-a of the New York Negotiable Instruments Law (article 19-A, Negotiable Instruments Law [Consol. Laws, c. 38]), which governs the relations of the parties in the absence of allegations that they contracted on a different basis. See Federal Reserve Bank v. Malloy, 264 U. S. 160, 164, 44 S. Ct. 296, 68 L. Ed. 617, 31 A. L. R. 1261; Dakin v. Bayly, 290 U. S. 143, 147, 54 S. Ct. 113, 78 L. Ed. —, 90 A. L. R. 999. Hence whatever the bank collected upon the note was held in trust for the plaintiff as the latter's agent, and, if traced into the hands of the receiver, might be reclaimed. See Davis v. Elmira Savings Bank, 161 U. S. 275, 289, 16 S. Ct. 502, 40 L. Ed. 700; Commercial Bank v. Armstrong, 148 U. S. 50, 57, 13 S. Ct. 533, 37 L. Ed. 363; Evansville Bank v. German-Am. Nat. Bank, 155 U. S. 556, 562, 15 S. Ct. 221, 39 L. Ed. 259; Massey v. Fisher, 62 F. 958 (C. C. E. D. Pa.); Ellerbe v. Studebaker Corp., 21 F. (2d) 993, 994 (C. C. A. 4); Turner, "Bank Collections—The Direct Routing Practice," 39 Yale L. J. 468. The difficulty is to trace into the hands of the receiver any identifiable sum of money held on trust when the bank closed its doors. The plaintiff argues that the bank's acceptance of the check of R. G. Brewer, Inc., should be considered the same as though cash had been handed over the counter, and the amount of the check, by which the bank's liability to its depositor was pro tanto extinguished, should be treated as a special deposit commingled with its general funds and charging them with an equitable lien in favor of the plaintiff. While this view is not without support in state decisions (see 82 A. L. R. 97), it does not prevail in the federal courts. American Can Co. v. Williams, 178 F. 420 (C. C. A. 2); Larabee Flour Mills v. First Nat. Bank, 13 F. (2d) 330 (C. C. A. 8); Ellerbe v. Studebaker Corp., 21 F. (2d) 993, 995 (C. C. A. 4); Allied Mills v. Horton, 65 F. (2d) 708, 90 A. L. R. 1 (C. C. A. 7); First Nat. Bank v. City of Miami, 69 F. (2d) 346 (C. C. A. 5); Wisdom v. Keen, 69 F. (2d) 349 (C. C. A. 5); Blakey v. Brinson, 286 — S. 254, at page 263, 52 S. Ct. 516, 518, 76 L. Ed. 1089, 82 A. L. R. 1288, where the opinion of Mr. Justice Stone says:

"The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor

points to any identifiable thing which could be the subject of it."

It is true that the state statute (section 350-l, subd. 2, art. 19-A, Negotiable Instruments Law) expressly grants a preference under the circumstances at bar upon the insolvency of the drawee or payor bank, but state legislation is unavailing if contrary to the act of Congress (12 U. S. C. A. § 194) as construed by the federal courts. On the authorities above mentioned and many others which might be cited, we think it is. Compare Royal Mfg. Co. v. Spradlin, 6 F. Supp. 98, 102 (D. C. M. D. N. C.); U. S. Fidelity & Guaranty Co. v. Nat. Bank of Am., 4 F. Supp. 569 (D. C. N. D. Ind.). Consequently the District Court's decision that neither of the first two counts of the bill of complaint states a cause of action must be affirmed.

It is otherwise as to the third count. This alleges that the check received in exchange for delivery of the note to its maker was received after banking hours on January 14th, was never discharged or canceled, and came into possession of the receiver. It is true that these allegations contradict the allegation incorporated by reference from count 2 that by acceptance of the check the sum of $3,015 was immediately charged against the account of R. G. Brewer, Inc. This might necessitate an amendment to strike out the contradictory allegation, but would not justify final dismissal if the other allegations are sufficient. Plainly the intent was to frame a count on the theory that the check was not charged against the maker's account and remains unpaid. As already stated, whatever the bank received in exchange for the plaintiff's note it held on the [fol. 43] same terms as the note itself; that is, as agent for the plaintiff. The check is not only an order on the drawee bank to pay the payee itself, but is also a bill of exchange (section 321, Negotiable Instruments Law) and an engagement by the drawer to pay the amount thereof to the payee if the bill is dishonored (section 111, Negotiable Instruments Law). That obligation of the drawer the bank held in trust for the plaintiff in lieu of the note. If, as alleged, the check was delivered after banking hours and was never charged against its account, the drawer's obligation to pay the bank still exists and is still held in trust for the plaintiff. The trustee refuses to enforce it

for the plaintiff's benefit, and we see no reason why the recalcitrant trustee should not be required to make it available for direct enforcement by the plaintiff itself. If the plaintiff can prove the facts alleged, we think it is entitled to a decree directing the receiver to assign (without recourse) and deliver the check according to the alternative prayer for relief. Accordingly it was error to dismiss the third count of the bill as against the receiver. To this extent the decree is reversed.

[fol. 44] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office building in the City of New York, on the 11th day of June, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

OLD COMPANY'S LEHIGH, INC., Plaintiff-Appellant,

vs.

HENRY E. MEEKER, as Receiver, etc., et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed as to the third count and affirmed as to the first two counts, with costs to the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 45] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Old Company's Lehigh, Inc., vs. Henry E. Meeker, as Receiver, etc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 11, 1934. William Parkin, Clerk.

[fol. 46] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 45, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Old Company's Lehigh, Inc., Plaintiff-Appellant, against Henry E. Meeker, as Receiver, etc., et al., Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of August, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 338.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,968. U. S. Circuit Court of Appeals, Second Circuit. Term No. 340. Old Company's Lehigh, Inc., Petitioner, vs. Henry E. Meeker, as Receiver for The First National Bank in Mamaroneck, et al. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1934. File No. 340, O. T., 1934.